

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

ERIC KALB

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**CRIMINAL ACTION
No. 16-12**

MCHUGH, J.

OCTOBER 24, 2016

MEMORANDUM

This is a criminal prosecution for the destruction of property located on federal land. By the Government's theory of the case, Defendant Eric Kalb aided and abetted the destruction of an electrical transfer box in the Valley Forge National Historical Park, by agreeing to drop off and pick up a friend there who intended to vandalize the box for recyclable metal in a practice known as "scrapping." Tragically, that friend, Mark Tuoni, was electrocuted. Although there is scant if any evidence that Defendant himself was engaged in scrapping that night, the Government's motivation for prosecution undoubtedly stems from the fact that Mr. Kalb is himself a known scrapper whose conduct has in the past put him on the wrong side of the law.

On the night that this tragedy occurred, Mr. Kalb made a 911 call from a payphone reporting the incident, but without identifying himself. Police responded both to the site of the electrocution and to the payphone from which the call originated, as they were understandably interested in identifying the caller. Mr. Kalb had left the phone from which he placed the call, but was stopped by police nearby, and voluntarily gave a statement that forms the foundation for this prosecution. The defense contends that the stop was unlawful, and that the resultant statement must therefore be suppressed. For the reasons that follow, I agree, and have entered an order granting the motion to suppress.

As an initial matter, I found the testimony of all the law enforcement officers credible. First, I am persuaded that Officer Raymond Emrich, who was dispatched to the payphone from where the call had been placed, had a proper basis for identifying a white male driving a white Ford Ranger with tinted windows as the likely caller. I also credit the testimony of Officer Byron Ferguson who stopped Mr. Kalb on the basis of that “flash” information. Finally, I credit the testimony of both Officer Theodore McGinley and Detective Les Glauner that at no time was Mr. Kalb in custody, and at all times his cooperation with the police was totally voluntary.¹ But my acceptance of all of the testimony of the various law enforcement personnel involved does not alter my conclusion that police lacked the authority to stop Mr. Kalb in the first instance.

The Government concedes that in the absence of a warrant, it has the burden to establish that the stop was lawful. *United States v. Herrold*, 962 F.2d 1131, 1137 (3d Cir. 1992). It attempts to justify the officers’ actions here under *Terry v. Ohio*, 392 U.S. 1 (1968), which permits “a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Although the Government’s burden under *Terry* is far less onerous than a showing of probable cause, the Government cannot justify stopping Mr. Kalb on the record here.

The content of the 911 call, set forth in an “Event Register”² submitted at the suppression hearing, in no way suggests that the caller is anything more than a witness. He stated that a male had been electrocuted; identified the site; described his efforts to find a phone; and reported that the victim “may have been scrapping.” The caller was obviously upset, and unwilling to identify himself, but said nothing that implicated himself in any criminal conduct. Based on the information supplied, before Officer Emrich even reached the location from which the call had

¹ For that reason, Defendant’s contention that there was a *Miranda* violation is rejected.

² The Event Register is attached to this Memorandum.

been made, authorities were able to identify and respond to the site of the electrocution.

Although the situation was obviously a serious one because it involved a fatality, the gravity of the matter does not change the controlling legal standard.

In elaborating on *Terry*, the Supreme Court has held that “[an] investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417 (1981). Or, as the Third Circuit has characterized *Terry*, an officer “must have a particularized and objective basis for believing that the particular person [being stopped] is suspected of criminal activity.” *United States v. Brown*, 159 F.3d 147, 149 (3d Cir. 1998). At most, the police had reason to believe that Mr. Kalb had information **about** likely criminal activity.

In that regard, the fact that Mr. Kalb was in a position to observe the offense he reported does not suffice, because mere proximity to criminal conduct is not a justification for an investigatory stop. *United States v. Navedo*, 694 F.3d 463, 468–69 (3d Cir. 2012) (extending the principles of *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), to investigatory stops).

In reaching this result, I attach particular significance to the fact that *Terry* focuses on situations where there is some immediacy, and where prompt police action is necessary in order to deal with an ongoing or future threat, as emphasized by the Supreme Court in *Cortez*. An accidental electrocution during an act of vandalism is not like an act of violence where a fleeing suspect who is armed poses an ongoing threat to public safety. At the point where Mr. Kalb was stopped, nothing was then “afoot,” as neither his unwillingness to identify himself to the 911 operator nor his attempt to elude identification was unlawful. Significantly, the investigatory needs of the police were already met when Officer Ferguson pulled up behind Mr. Kalb’s vehicle and was able to identify the license plate. That information alone would have sufficed, without

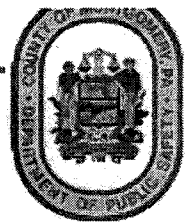
pulling him over. The relevance of such alternative methods was recognized by the Court of Appeals in *United States v. Roberson*, 90 F.3d 75, 81 (3d Cir. 1996), where an anonymous tip to a 911 operator that a suspect was dealing drugs on a street corner was deemed insufficient to support a *Terry* stop. In suppressing evidence obtained pursuant to the stop, the Court observed that police are hardly powerless in such a situation, as the initial information they have can form the basis for further investigation such as surveillance. Here, the officer who stopped Mr. Kalb could have continued to follow him to his destination and engaged him in conversation, or other officers later could have gone to his home to engage in what is colloquially referred to as a “knock and talk” encounter. Indeed, Mr. Kalb’s willing cooperation after he was pulled over suggests that such tactics would have sufficed to meet the needs of the investigation.

Roberson sheds further light on this case in another respect. There, an anonymous tip reporting supposedly ongoing criminal activity was deemed insufficient to support a stop in the absence of direct police observation. Here, the anonymous tip reported only that a man had been electrocuted, and the subsequent stop was unsupported by any law enforcement information whatsoever and based entirely on an inference that the tipster himself might have been criminally involved. If the tip in *Roberson* was deemed unreliable absent some confirmation, I cannot see how the simple act of making a call to 911 reporting an incident can provide the justification for a stop.

Mr. Kalb's statement was the product of the unlawful stop, and the Government does not try to argue that there is any "meaningful intervening event" that would attenuate its taint.

Taylor v. Alabama, 457 U.S. 687, 691 (1982). Accordingly, it cannot be used as evidence.

/s/ Gerald Austin McHugh
United States District Judge

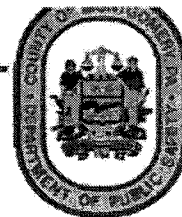


Event Register

Event Number : P14495512

Event Comments

Date & Time	Create Terminal	Comment
Sep 13, 2014 03:59:58	cad023	MALE SAYING ANOTHER MALE WAS ELECTROCUTED
Sep 13, 2014 03:59:58	cad023	AT THE OLD 'JOHN KENNEDY SUPPLEE RESTAURANT NEAR VALLEY FORGE PARK
Sep 13, 2014 04:00:00	mcad1	** PI/CN search completed at 09/13/14 04:00:00
Sep 13, 2014 04:00:13	cad023	CALLER DROVE TO NORRISTOWN TO FIND A PAYPHONE
Sep 13, 2014 04:00:50	cad023	SAYING THE STORE IS CLOSING
Sep 13, 2014 04:00:55	cad023	CALLER RAMBLING
Sep 13, 2014 04:01:06	cad023	SAYING HE SAW A SPARK, CANT FIND THE FRIEND OF THE MALE
Sep 13, 2014 04:01:31	cad023	THE MALE MAY HAVE BEEN SCRAPPING
Sep 13, 2014 04:02:04	cad023	THE OWNERS OF THE STORE ARE TRYING TO CLOSE, TRYING TO GET THE CALLER TO HANG UP
Sep 13, 2014 04:02:18	cad023	SAYS IT IS ON THE ROAD NEAR THE CASINOS
Sep 13, 2014 04:03:02	cad023	CALLER REFUSIG TO ANSWER QUESTIONS OR GIVE HIS NAME
Sep 13, 2014 04:03:31	umer01	56502- SEE IF 52CAR CAN MEET COMPL AND SPEAK WITH HIM WHILE WE LOOK FOR SUBJ
Sep 13, 2014 04:07:49	umer01	** Event Location changed from "W VALLEY FORGE RD/W BEIDLER RD UMER: alias RT23/BEI" to "1700 S TROOPER RD UMER: @KENNEDY SUPPLEE MANSION - VFNP" at: 09/13/14 04:07:49
Sep 13, 2014 04:07:49	umer01	** >>>> by: JAMIE E. WEST on terminal: umer01
Sep 13, 2014 04:07:51	mcad1	** PI/CN search completed at 09/13/14 04:07:51
Sep 13, 2014 04:07:52	umer01	** POLICE event P14495512 created
Sep 13, 2014 04:08:10	umer01	56502- PT APPEARS TO BE C/5
Sep 13, 2014 04:08:26	cad008	207 ENROUTE TO MCDONALD'S
Sep 13, 2014 04:09:23	cad009	56STA-FD FOR LIGHTING
Sep 13, 2014 04:09:28	cad008	207 -- NO ONE IS OUT HERE, GIVE CALLER A CALL BACK
Sep 13, 2014 04:10:10	cad042	** Event Type changed from MUN to FSS at: 09/13/14 04:10:10
Sep 13, 2014 04:10:10	cad042	** >>>> by: LEVENT I. AYDIN on terminal: cad042
Sep 13, 2014 04:10:11	cad042	** 56PD event P14495506 requested to cancel
Sep 13, 2014 04:10:11	cad042	** EMS event E1450731 requested to cancel
Sep 13, 2014 04:10:11	cad042	Cancel Request from agency POLICE : EMS event E1450731: event type changed to FSS
Sep 13, 2014 04:10:11	cad042	>>>> by: LEVENT I. AYDIN at 09/13/14 04:10:11 on terminal: cad042
Sep 13, 2014 04:10:12	cad042	** POLICE event P14495512 requested to cancel
Sep 13, 2014 04:10:12	cad042	** POLICE event P14495510 requested to cancel
Sep 13, 2014 04:10:12	cad042	** 047FD event F1425053 created
Sep 13, 2014 04:10:12	cad042	Cancel Request from agency POLICE : EMS event E1450731: event type changed to FSS
Sep 13, 2014 04:10:12	cad042	>>>> by: LEVENT I. AYDIN at 09/13/14 04:10:12 on terminal: cad042
Sep 13, 2014 04:11:28	cad008	207 -- N/B ON MARKEYL ST, WHI FORD RANGER TINTED WINDOWS
Sep 13, 2014 04:12:09	cad042	** Event Type changed from FSS to MEL at: 09/13/14 04:12:09
Sep 13, 2014 04:12:09	cad042	** >>>> by: LEVENT I. AYDIN on terminal: cad042



Event Register

Event Comments

Date & Time	Create Terminal	Comment
Sep 13, 2014 04:12:10	cad042	** Event Type changed from MUN to MEL at: 09/13/14 04:12:10
Sep 13, 2014 04:12:10	cad042	** >>>> by: LEVENT I. AYDIN on terminal: cad042
Sep 13, 2014 04:12:11	cad042	** Event Type changed from MUN to MEL at: 09/13/14 04:12:11
Sep 13, 2014 04:12:11	cad042	** >>>> by: LEVENT I. AYDIN on terminal: cad042
Sep 13, 2014 04:12:12	cad042	** 047FD event F1425053 requested to cancel
Sep 13, 2014 04:12:12	cad042	** Event Type changed from MUN to MEL at: 09/13/14 04:12:12
Sep 13, 2014 04:12:12	cad042	** >>>> by: LEVENT I. AYDIN on terminal: cad042
Sep 13, 2014 04:13:05	cad008	207 - CALLER DOES NOT KNOW WHAT CAR HE WAS DRIVING
Sep 13, 2014 04:13:44	cad043	CH47-DISPATCH R47 F47 AT REDUCED SPEED
Sep 13, 2014 04:14:17	cad008	207 - W/M, GRY PANTS AND GRY JACKET
Sep 13, 2014 04:14:50	cad042	-- page to 47 - Note: R47+F47 AT REDUCED SPEED PER CH47
Sep 13, 2014 04:15:11	cad008	ZD22271 - 211
Sep 13, 2014 04:15:46	cad008	211 - 200-BLK SWEDE
Sep 13, 2014 04:16:01	cad008	52211 - LIC/ZDZ8271, LIS/PA, LIY/14, LIT/PC.
Sep 13, 2014 04:16:01	mcad1	** VEH search completed at 09/13/14 04:16:01
Sep 13, 2014 04:16:13	cad008	211 - THIS MIGHT BE HIM, HE HAS A BUNCH OF WINDOWS IN THE BACK
Sep 13, 2014 04:16:19	cad044	
Sep 13, 2014 04:16:37	cad008	201 - HAVE UPPER MERION RESPOND HERE
Sep 13, 2014 04:17:24	cad008	56PD - WE WILL NEED HIM BROUGHT OVER HERE
Sep 13, 2014 04:17:44	mcad1	** PI/CN search completed at 09/13/14 04:17:44
Sep 13, 2014 04:17:45	mcad1	** PI/CN search completed at 09/13/14 04:17:45
Sep 13, 2014 04:20:53	cad008	201 - WILL HAVE SOMEONE S/B WITH VEH FOR 56PD'S TOW
Sep 13, 2014 04:22:46	cad008	211 - TX MALE TO 56PD S/M 87.1
Sep 13, 2014 04:22:49	cad008	209 FOLLOWING
Sep 13, 2014 04:24:40	cad008	207 STANDING BY WAITING FOR THE TOW
Sep 13, 2014 04:27:53	cad008	211 - 89.8
Sep 13, 2014 04:28:16	umer01	JAMISON'S ENRT FOR THE TOW
Sep 13, 2014 04:30:39	cad008	207 - ERIC KALB 2-1-1975
Sep 13, 2014 04:33:11	mcad1	** PERSON search completed at 09/13/14 04:33:11
Sep 13, 2014 04:33:57	cad008	29S NEG ON ERIC KALB
Sep 13, 2014 04:43:06	cad008	207 - 56PD & JAMISON'S ON SCENE, I'M CLEAR
Sep 13, 2014 04:43:10	cad008	** Event P14495510 closed.
Sep 13, 2014 04:44:13	cad041	317-3 WE WILL BE HERE FOR AWHILE TIL PECO ARRIVES AND SHUTS THE POWER OFF
Sep 13, 2014 04:46:14	cad004	5801 ADVISED-WILL BE CONTACTING UMPD DIRECT
Sep 13, 2014 05:12:57	cad026	** Cross Referenced to Event # P14495536 at: 09/13/14 05:12:57
Sep 13, 2014 05:12:57	cad026	** >>>> by: ERIN K. MELVILLE on terminal: cad026
Sep 13, 2014 05:25:31	cad026	** Cross Referenced to Event # P14495540 at: 09/13/14 05:25:31
Sep 13, 2014 05:25:31	cad026	** >>>> by: ERIN K. MELVILLE on terminal: cad026
Sep 13, 2014 05:33:32	cad016	1406-- ENRT TO
Sep 13, 2014 05:51:38	cad016	1406 - ON SCENE



Event Register

Event Comments

Date & Time	Create Terminal	Comment
Sep 13, 2014 05:52:56	cad041	317-3 CLEAR RELEASED BY 56PD OBVIOUS C/5
Sep 13, 2014 05:53:04	cad041	** Event E1450731 closed.
Sep 13, 2014 07:01:07	cad043	CH47 - 47 AVAIL
Sep 13, 2014 07:01:16	cad043	** Event F1425053 closed.
Sep 13, 2014 09:12:48	umer01	** Event P14495506 closed.
Sep 13, 2014 09:54:44	cad004	** Event P14495512 closed.